

ANTOINETTE D.,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 17-24

OPINION

INTRODUCTION

Appellant challenges the decision of the Montgomery County Board of Education (local board) upholding the superintendent's decision to suspend her son, P.V., from school for 10 days for giving Xanax to another student. The local board has filed a Motion to Dismiss. Appellant responded to the motion and the local board replied.

FACTUAL BACKGROUND

Appellant's son, P.V., attends Bethesda-Chevy Chase High School (BCC). During the 2016-17 school year, he was in the 10th grade. On November 22, 2016, a student (Student A) at BCC became ill after taking Xanax.¹ Student A was escorted to the health room and later was taken to the hospital after school officials called 911. While in the health room, Student A told the assistant principal, Amy Councilman, that she obtained the Xanax from another student P.V., giving his first name only. At the hospital, Student A provided P.V.'s last name and confirmed he had provided her with Xanax.² (Motion, Ex. 2, 7).

On November 23, 2016, Ms. Councilman spoke to Student A again. Student A explained that P.V. gave her Xanax in a hallway outside of their second period French class. Ms. Councilman reviewed security video and confirmed that P.V. and Student A were in the hallway together at that time. The video showed P.V. interacting with four students, including Student A. According to Ms. Councilman, the video appeared to show P.V. reaching into his backpack and moving his hands in and out of his sweatshirt pockets. In later statements made after she returned to school, Student A explained that she received half of a Xanax pill from P.V. and another half Xanax pill from another student sometime later that day. Appellant, her husband, and P.V.'s father met with Ms. Councilman that day to discuss the incident. They were shown the surveillance video and informed of Student A's statement. P.V. denied providing Student A with Xanax. (Motion, Ex. 2-5, 6, 7).

¹ Xanax is a brand name for a prescription drug called Alprazolam, which is used to treat anxiety and panic disorders by acting on the brain and central nervous system to produce a calming effect. *See* Xanax, WebMd, *available at* <http://www.webmd.com/drugs/2/drug-9824/xanax-oral/details> (last accessed June 14, 2017).

² Four other students also went to the health office with similar symptoms, but P.V. was only accused of giving Xanax to Student A. (Motion, Ex. 7).

That same day, Principal Donna Redmond Jones suspended P.V. for 10 days and notified Appellant that she would request his expulsion from school. Principal Jones explained that P.V. had been identified by another student as distributing Xanax and that he could be seen in the hallway during and after class reaching into his backpack and sweatshirt pocket multiple times to pass something to other students. (Motion, Ex. 1).

On December 1, while he was suspended, P.V. reached out to Student A using Snapchat.³ P.V. reportedly told Student A through Snapchat that she should make sure the school understood that Student B provided her with the second Xanax pill. Prior to that point, Student A had not known Student B's name. (Motion, Ex. 7).

After the Snapchat conversation, Student A asked school administrators if she could add to her previous statements. She requested that P.V. not be suspended from school and identified another student, Student B, as the "main person who gives [Xanax] out." Student A again stated that P.V. provided her with the initial half Xanax pill, but explained that she asked P.V. for the pill. When Student A asked P.V. for another half pill, she said that P.V. told her that Student B was the main source for Xanax. She also stated that P.V. told her he does a lot of research in drugs and warned her against taking a full pill. (Motion, Ex. 3, 7).

Appellant appealed her son's expulsion. She argued that Student A was under the influence of drugs when she made her initial statement and maintained that the security video did not provide any evidence that P.V. gave Xanax to Student A. (Motion, Ex. 6).

On December 6, 2016, an expulsion hearing occurred with P.V., Appellant, her husband, P.V.'s father, Principal Jones and Ms. Councilman. P.V. was represented by counsel. During the hearing, P.V. denied giving Xanax to Student A. He stated that he saw Student B give Xanax to Student A. P.V. admitted that he communicated with Student A on Snapchat, but said he did so to confirm that (1) she was the source of the allegations against him and (2) to find out why she gave his name and not Student B's name to school officials. Appellant and her husband told the hearing officer that they questioned P.V. and believed he was not responsible. They suggested that Student A provided P.V.'s name because she was scared of Student B. The hearing officer also reviewed P.V.'s prior disciplinary history, which included a March 2016 suspension after he was caught drinking alcohol during a school-sponsored event. (Motion, Ex. 7).

The hearing officer concluded that the 10-day suspension was warranted but recommended denying the request for expulsion. The hearing officer found that Student A had consistently identified P.V. as a source of Xanax and that security footage showed P.V. giving something to another student in the school hallway. The hearing officer determined that P.V. did not take responsibility for his part in the incident, which overall caused several students to become ill and disrupted the school day. (Motion, Ex. 7). On December 13, 2016, Andrew Zukerman, the superintendent's designee, adopted the recommendation of a 10-day suspension and denied the request for expulsion. (Motion, Ex. 9).

³ Snapchat is a messaging app for mobile phones that allows users to send messages that disappear after a short time period.

On December 21, 2016, Appellant appealed to the superintendent. Because the superintendent's designee had already issued a decision, this was treated as an appeal to the local board. In her appeal, Appellant argued that the surveillance video did not prove her son provided Xanax to Student A; that family members and P.V.'s lawyer questioned him and concluded he did not do it; that school authorities did not do a thorough job of investigating; and that Student A gave inconsistent statements and was not a credible witness. (Motion, Ex. 10).

On January 24, 2017, Appellant presented additional information to the board. She submitted the results of a polygraph examination of P.V. arranged for by Appellant. According to the polygraph report, P.V. was twice asked whether he gave Xanax to Student A. The exam showed "no deception indicated" and the polygraph examiner concluded that P.V. was truthful in answering those questions. (Motion, Ex. 13; Appeal, Credibility Assessment of Maryland Polygraph Examination Report).

On February 27, 2017, the local board issued its decision upholding the 10-day suspension. The board found that P.V. violated Montgomery County Public Schools (MCPS) Regulation COF-RA (Alcohol, Tobacco, and Other Drugs on MCPS Property) and the MCPS Code of Conduct by providing Student A with half of a Xanax pill. While the board acknowledged P.V.'s claim of innocence, it declined to consider the results of the polygraph examination. The board determined that there is significant disagreement over the accuracy of polygraph exams and the board did not find the evidence reliable. The board also concluded that accepting polygraph evidence "could potentially set an unfair precedent between MCPS families with different financial means and resources." (Motion, Ex. 14).

As to the merits, the board found that although Student A amended her statement several times, she consistently identified P.V. as a student who provided her with Xanax. The board agreed with Appellant that the video evidence was not conclusive, but found that it did confirm Student A's story that she was in the hallway with P.V. outside of their French classroom. The board determined that the video footage was a "supplement" to the investigation, not the sole determining factor of what occurred. In sum, the board found that P.V.'s conduct was "serious and warranted significant consequences." The board observed that Student A was taken to the hospital in part because of the Xanax provided by P.V. (Motion, Ex. 14).

This appeal followed.

STANDARD OF REVIEW

In student suspension and expulsion cases, the decision of the local board is considered final. COMAR 13A.01.05.05(G)(1). Therefore, the State Board will not review the merits of the decision unless there are "specific factual and legal allegations" that the local board failed to follow State or local law, policies, or procedures; violated the student's due process rights; or the local board has acted in an unconstitutional manner. COMAR 13A.01.05.05(G)(2).

The State Board may reverse or modify a student suspension or expulsion of the allegations are proved true or if the decision if the local board is otherwise illegal. COMAR 13A.01.05.05(G)(3).

LEGAL ANALYSIS

The local board argues that the appeal should be dismissed because Appellant has failed to allege any specific facts that the local board violated State or local law, policies or procedures, violated P.V.'s due process rights, or acted in an unconstitutional manner. In our view, the Appellant has raised several arguments about why the local board's decision was illegal. Accordingly, we deny the Motion to Dismiss and consider those arguments.

Exclusion of polygraph evidence

During her appeal to the local board, Appellant presented the results of a polygraph test administered to P.V. The local board declined to consider the polygraph report, concluding that polygraph examinations are of questionable reliability and create an unfair advantage to students who can afford to obtain them as part of disciplinary appeals. Appellant maintains that polygraph evidence has been accepted by courts when used in administrative proceedings and cites to two federal appeals court decisions. She argues the board acted illegally by not accepting the polygraph report as evidence.

It is "well-settled in Maryland that the results of a polygraph test are inadmissible." *In re A.N.*, 226 Md. App. 283, 310 (2015) (quoting *Murphy v. State*, 105 Md.App. 303, 309 (1995)). This rule applies "even under the relaxed evidentiary rules that apply to administrative proceedings." *Id.* Maryland courts have repeatedly declined to find that polygraph exams constitute "competent" evidence. *Id.* The Court of Appeals for the Fourth Circuit, which includes Maryland, also has a "per se rule against the admission of polygraph evidence." *See U.S. v. Prince-Oyibo*, 320 F.3d 494, 499-500 (4th Cir. 2003).

The local board's conclusion that polygraph evidence is not inherently reliable is a concern that has long been shared by Maryland courts. Given the state of Maryland law, it was not illegal for the local board to decline to consider the polygraph report.

Violation of an MCPS Memorandum of Understanding

Appellant next argues that P.V.'s suspension was illegal because MCPS violated a Memorandum of Understanding (MOU) between MCPS, the Montgomery County State's Attorney's Office, and local law enforcement agencies regarding law enforcement responses to school-based incidents. Appellant argues MCPS violated the MOU by investigating the allegations against Appellant rather than turning the matter over to law enforcement because the MOU states that law enforcement agencies will take the lead in investigating "critical incidents," including "distribution or manufacture of a controlled dangerous substance." (Appeal, MOU, Section B.II.H.1). Appellant maintains that MCPS did a poor job investigating the incident and that the matter should have been handled by police.

The MOU was included as part of Appellant's appeal, but was not raised as an issue before the local board. Because Appellant never raised this argument before the local board, she has waived that issue on appeal. *See Goines v. Prince George's County Bd. of Educ.*, MSBE Op. No. 17-16 (2017) (declining to reach issues not first raised before the local board). Even were we to consider Appellant's argument, the MOU specifically states that "[n]one of the provisions of this Agreement are intended for the benefit of any third party, and no such third party shall

have the right to enforce the provisions of this Agreement.” (Appeal, MOU, Section B.II.J). This provision forecloses any claim by Appellant that the suspension was illegal because of a violation of the MOU.

Merits of the appeal

The remainder of Appellant’s arguments challenge the evidence relied upon by the local board. Appellant argues that the video evidence does not prove that her son provided Xanax to Student A. She also argues that Student A was an unreliable witness. These arguments concern the weight that the local board should have given the evidence. Under our standard of review, we do not review that issue. COMAR 13A.01.05.05(G)(2).

CONCLUSION

For all of these reasons, we deny the Motion to Dismiss the appeal, but affirm the decision of the local board.

Signatures on File:

Andrew R. Smarick
President

Chester E. Finn, Jr.
Vice-President

Michele Jenkins Guyton

Justin Hartings

Stephanie R. Iszard

Rose Maria Li

Michael Phillips

Madhu Sidhu

Guffrie M. Smith, Jr.

June 27, 2017